IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

FRIDAY, THE 1ST JUNE 2007 / 11TH JYAISHTA 1929

WP(C).No. 11252 of 2007(M)

OS.188/2004 of ADDL.SUB COURT,KOLLAM
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PETITIONER:

P.GOVINDA PILLAI,
GEETHA BHAVAN, KUNNATHOOR P.O.,
KOLLAM DISTRICT.

BY ADV. SRI.BINDU SREEKUMAR

RESPONDENT:

P.SIVASANKARA PILLAI,
THANKAPRABHA, PUNNATHALA NORTH,
THIRUMULLAVARAM P.O., KOLLAM-12.

BY ADV. SRI.T.M.CHANDRAN
SRI.V.A.SASIDHARAN
SRI.JOSEPH ALBIN NEDUNTHALLY

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 01/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C) NO.11252/2007

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE PLAINT IN OS. NO.188/2004 OF THE ADDITIONAL SUB COURT, KOLLAM DT.7.6.04.

EXT.P2:- COPY OF THE AFFIDAVIT FILED BY THE RESPONDENT IN EXT.P1 PLAINT DT.7.6.04.

EXT.P3:- COPY OF THE OBJECTION FILED BY THE PETITIONER IN EXT.P1 PLAINT DT.24.7.04.

EXT.P4:- COPY OF THE ORDER OF THE ADDITIONAL SUB COURT, KOLLAM DT.26.8.06 IN IA. NO.2344/04 IN OS. 188/04.

/TRUE COPY/

tss

M.N.KRISHNAN, J

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W.P.(c)No.11252 OF 2007

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Dated this the 1st day of June, 2007

JUDGMENT

This writ petition is filed challenging Ext.P4 order. The suit is one for partition. The relief claimed in the plaint is partition of 1/6 shares in the plaint A and plaint B schedule properties and division of C schedule properties. The plaintiff has valued the plaint under Section 37(2)(ii) of the Kerala Court Fees and Suit Valuation Act.

2. On the other hand, defendants would contend that the plaintiff does not have any existing title to the property and the property is in the possession of the 2nd defendant and it is not partible. In order to claim partition and pay court fee under Section 37(2), there must be averment in the plaint regarding joint possession of the property. If a co-owner is out of possession, then the law contemplates payment of court fee under Section 37(1) of the Court Fees Act. If the plaintiff is claiming joint possession and he is found to be out of possession whether a decree can be passed or not is a matter to be decided after adducing evidence and as per the provisions of law. So, at this juncture the point to be decided is what is the averment in the plaint. Unfortunately though a very detailed plaint is filed there is no

specific averment anywhere in the plaint regarding jointness of the possession of the property.

3. Since the other side is refuting even the right of the plaintiff and is claiming independent possession over the property, it is for the plaintiff to mould appropriate relief in the plaint. In order to enable the plaintiff to mould the proper relief and also regarding court fee and jointness of possession I feel an opportunity must be given to amend the plaint. When the plaint is amended, certainly defendants will get a right to file additional written statement.

Therefore the order under challenge is set aside and the plaintiff is given an opportunity to amend the plaint incorporating the plea of joint possession and in case he chooses to mould his relief under Section 37(1) it may be done. Then on receipt of the additional written statement the court may consider the correctness of the payment of court fee and the matter be decided accordingly.

Parties are directed to appear before the trial court on 4.7.2007.

Writ petition is disposed of as above.

M.N.KRISHNAN, JUDGE

Cdp/-